



February 14, 2002

Ms. Martha Sepeda
City Attorney
City of Del Rio
109 West Broadway
Del Rio, Texas 78840-5527

OR2002-0747

Dear Ms. Sepeda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157997.

The City of Del Rio (the "city") received a request for "[t]he appropriation, budget or expenditures of funds for attorneys' fees, expert witnesses, and consultants which, in any way, related to the protest of Adobe Eco-Systems, Ltd.'s [("Adobe")] landfill permit application with the Texas Natural Resource Conservation Commission." You inform us that some of the requested information has been previously released in accordance with Open Records Letter No. 98-0853 (1998). You further inform us that the city seeks to continue withholding the information we previously ruled is excepted from disclosure in Open Records Letter No. 98-0853 (1998), but that you have marked specific information to be withheld in case this office now uses a more restrictive standard of review. You also inform us that the city will release additional information to the requestor. The city claims that portions of the submitted information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information, some of which consists of representative samples.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first address the city's comments and corresponding markings on the documents which support its contention that some of the submitted information is not responsive to the instant request. With respect to that contention, we note that this ruling only addresses the responsive information submitted and does not reach information marked by the city as nonresponsive.

We further note that a portion of the information we previously ruled was excepted from disclosure under section 552.103 is now subject to section 552.022 of the Government Code. Section 552.022 enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Section 552.022(a)(3) defines one such category as "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." In addition, section 552.022(a)(16) defines another category as "[i]nformation that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege." The submitted information contains invoices wherein the city is billed for services performed and attorney fee bills, both of which must be released under subsections (a)(3) and (a)(16), respectively, unless the information is expressly made confidential under other law. You claim that the information is excepted from disclosure under sections 552.103, 552.107(1), and 552.111. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. In some instances, the attorney fee bills and invoices contain information that is protected under Rule 503, and we have marked the documents accordingly.²

You also assert that portions of these documents are protected under the attorney work product privilege. The attorney work product privilege can be found in Rule 192.5 of the Texas Rules of Civil Procedure. An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or

²We note that you marked specific entries in some fee bills as being subject to the attorney-client privilege. For those fee bills, we only addressed the applicability of Rule 503 to the entries you marked. On the other hand, you did not mark any entries in other fee bills as being protected under the attorney-client privilege. For those documents, we assume you sought to withhold all of the descriptive summaries in those fee bills, and we reviewed the applicability of Rule 503 to each entry. We further note that in future requests to this office, please provide us with a list of names for the attorneys and their clients so that we are able to more readily determine when a communication is privileged.

legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). In this instance, after careful review, we conclude that you have failed to demonstrate that the remaining information in the attorney fee bills and invoices is core work product protected under Rule 192.5. Thus, the city may not withhold any of the information subject to section 552.022(a) under that provision.

We now address the submitted information that is not subject to section 552.022. The city claims this information is excepted from public disclosure under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551* at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

In Open Records Letter No. 98-0853 (1998) we concluded that the city reasonably anticipates being a party to the hearing on the Adobe permit and may, therefore, withhold certain portions of the submitted information under section 552.103. Because you indicate that the city still anticipates being a party to the litigation, we find that you may continue to withhold from disclosure information related to the anticipated litigation based on section 552.103. *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 (2001). We note that you have submitted information to this office that was generated after we issued Open Records Letter No. 98-0853 (1998). To the extent these documents do not contain section 552.022 material, they may be withheld under section 552.103 as well.³ Accordingly, we have marked the submitted information that may be withheld under section 552.103.

In sum, the city may withhold the information we have marked under Rule 503. In addition, the city may withhold the information we have marked under section 552.103, to the extent the information has not been obtained by the opposing party or the litigation has not ended. The remaining information, however, must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

³Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

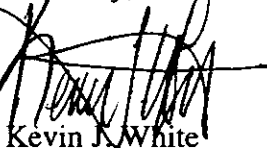
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 157997

Enc. Marked documents

c: Mr. William W. Thompson, III
Grissom & Thompson, LLP
609 West 10th Street
Austin, Texas 78701
(w/o enclosures)